Supreme Court, U.S.
FILED
JAN 28 1997
CLERK

No. 96-504

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

BIVENS LITTLE, *et al.*,

Petitioners,

v.

MARION BARRY, JR., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Goldberg v. *Kelly*, 397 U.S. 254 (1970), established that a person receiving welfare benefits may not have his benefits terminated on the ground that he no longer qualifies for them without first being afforded due process—*i.e.*, adequate notice of the proposed termination and the opportunity for a hearing at which he can attempt to show his continuing eligibility. Here, the Court of Appeals held, and respondents contend, that petitioners, who had been receiving GPA benefits from the District of Columbia, were not entitled to due process when the District cut off their benefits, because D.C. law limited their right to benefits to a "certification period" so that their "property" interest in the receipt of the benefits expired at the end of the period.

The court below and respondents have either misunderstood or ignored the square holding of *Goldberg*. Under D.C. law, petitioners were entitled to continue receiving benefits *after* their certification periods ended

so long as they continued to meet the applicable eligibility criteria. For that reason, they had a property interest in the continued receipt of benefits cognizable under the Due Process Clause. The Court of Appeals' judgment to the contrary conflicts with this Court's precedents, conflicts with numerous other lower court precedents, and raises an important issue meriting this Court's attention. Certiorari should therefore be granted.

1. Respondents initially "question" whether the petition should be granted since, in their view, petitioners' framing of the question presented "ignore[s] the principal rationale of the Court of Appeals." Br. in Opp. 9. In this, respondents are simply wrong. The question presented in the petition—whether persons receiving GPA benefits are entitled to adequate notice and the opportunity for a pretermination hearing when they are determined to be ineligible for benefits on the basis of an application of a change in the benefits eligibility criteria (Pet. i)—is the central issue in this case.

In the court below, petitioners argued that they were entitled to due process because they had been receiving benefits under statutory standards defining eligibility for those benefits and because D.C. law provided that the benefits would continue so long as they continued to meet the conditions of eligibility, whatever those conditions might be. *See* Pet. App. 10a (reproducing part of petitioners' brief). In response to this, the Court of Appeals said that "[w]hat this argument overlooks is that, after June 30, 1991 [the day before D.C. Law 9-27 took effect], the members of the plaintiff class did *not* meet the medical eligibility standard. It had been changed." *Id.* Thus, the court below held that petitioners lacked a due process right because the District changed the criteria for eligibility in its GPA program. The question presented fully captures that question. To the extent that the Court of Appeals rested its decision on the erroneous notion, *see infra* at 3-4, that petitioners

had no property interest in receiving benefits due to the District's use of certification periods, whether petitioners had such an interest is a subsidiary issue encompassed by the question presented.

2. Respondents, adopting the rationale of the Court of Appeals, argue that the termination of petitioners' benefits without due process comports with this Court's cases because petitioners had no property interest in receiving benefits. The reason for that, they say, is that D.C. Law 9-27 limited any such interest petitioners had in obtaining benefits to the duration of their certification periods. Br. in Opp. 10. But again, respondents, like the court below, have fundamentally misunderstood the governing law in this area. Petitioners had a property interest in the continued receipt of benefits because *under D.C. Law 9-27 they were entitled to continue to receive benefits so long as they continued to meet the eligibility criteria.*

As this Court made clear in *Board of Regents* v. *Roth*, 408 U.S. 564, 576 (1972), "a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process. *Goldberg* v. *Kelly*, 397 U.S. 254." Significantly, this property interest vests in benefits recipients even though they have not yet established their actual eligibility for future benefits. Thus, the recipients in *Goldberg*—who, like petitioners, were subject to periodic reviews of their eligibility, *see Goldberg*, 397 U.S. at 258—"had not yet shown that they were, in fact, within the statutory terms of eligibility. But [this Court] held that they had a right to a hearing at which they might attempt to do so." *Roth*, 408 U.S. at 577.

Under *Goldberg*, then, it does not matter that D.C. law provided for the potential cessation of benefits at the end

of a given certification period. What matters is that the law provided for the continuation of benefits past that certification period so long as eligibility continued. Since the end of a certification period did not necessarily mean that benefits would end, but only that continuing eligibility had to be periodically reassessed, the District's use of certification periods did not undo recipients' expectations that they would continue to receive benefits so long as they continued to meet eligibility standards. Rather, certification periods are merely a procedural device for facilitating continuing-eligibility determinations. And as this Court has said, "'[p]roperty' [as used in the Fifth Amendment] cannot be defined by the procedures provided for its deprivation." *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 541 (1985).

The effect of the ruling of the court below, defended here by respondents, is to make *Goldberg* meaningless. Under their approach, a governmental provider of benefits can circumvent *Goldberg* by simply declaring that the recipient is being given the benefit for a fixed term (say, a "certification period"), no matter how brief, following which he may reapply for additional benefits but, if he is deemed ineligible on the basis of the paper record, he will have no right to notice or a hearing before his benefits are cut off. Such a scheme makes a mockery of *Goldberg*'s admonition that "when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process * * *. [T]he crucial factor in this context * * * is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits." 397 U.S. at 264.

Respondents argue that petitioners' approach unduly "limit[s] the power of the legislature" in designing benefits programs. Br. in Opp. 12. But that is not so. Legislatures are free under petitioners' approach to

impose absolute time limitations upon the right to receive benefits. For example, a legislature could certainly provide that benefits will be supplied for a maximum of two years, following which no more benefits can be received. And under this Court's cases, the constitutional requirement of procedural due process would not call into question the legality of such programs.[1] Thus, in *Roth*, a professor with a one-year contract of employment had no property interest in retaining his job at the end of the year because there were "no statutory or administrative standards defining eligibility for re-employment." *Roth*, 408 U.S. at 566-567. The requirements of due process do apply, however, if a legislature provides, as the District indisputably did in this case, that benefits shall continue so long as eligibility continues. In such a case, *Goldberg* holds that recipients are entitled to adequate notice and the opportunity for a pretermination hearing.

Finally, even if D.C. Law 9-27, by its terms, did not create a property interest in GPA recipients in the continued receipt of benefits, the District's implementation of the law surely did, as explained in the petition. *See* Pet. 5-6, 15 (citing *Perry* v. *Sindermann*, 408 U.S. 593 (1972)). Specifically, by employing the exact same procedures and using the exact same forms in administering the new law as it did with respect to the old law, and by failing to advise either GPA recipients or their doctors of the change in the law, the District created on the part of GPA recipients a reasonable expectation that if they continued to be disabled they would continue to

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[1] In this vein, Section 103(a) of the Personal Responsibility and Work Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996), provides that, with certain exceptions, a State may not provide assistance to a family that includes an adult who has received assistance for more than 60 months (consecutively or not) under a program funded at least in part by federal block grants.

receive benefits. Respondents make no argument to the contrary and fail even to cite *Perry*.

3. Respondents contend that during oral argument in the court below petitioners conceded that the District could, in theory, have limited entitlement to GPA benefits to a fixed period and therefore, they say, the question in this case involves nothing more than the construction of D.C. law—*i.e.*, whether the District in fact created a "durationally limited" entitlement. Br. in Opp. 14. This is a complete red herring.

It is true, as the Court of Appeals noted, that petitioners acknowledged below that "the [D.C.] Council *could* have limited a recipient's entitlement to GPA benefits to a concrete, finite span of time." Pet. App. 9a-10a. But respondents fail to note what the Court of Appeals acknowledged in the same breath—that petitioners added "that the 1991 legislation, under which they contend their property interest is derived, contained no such limitation." *Id.* at 10a. The central point is that there is no dispute in this case about what D.C. Law 9-27 says. That law provides that a GPA recipient's benefits shall be terminated at the end of his certification period unless he reapplies and is found to be eligible for additional benefits under the new eligibility criteria; a recipient who does not meet the new criteria after his certification period ends has no right under the statute to notice or the opportunity for a hearing prior to the termination of benefits. Again, none of this is in dispute. The question here is whether, given this statutory scheme, petitioners had a right to due process. That is the federal constitutional issue presented in this case and it warrants this Court's review.

4. Respondents argue that this Court should deny the petition because of Congress' adoption of the Personal Responsibility and Work Reconciliation Act of 1996. Br. in Opp. 16. In fact, as noted in the petition, Pet. 25,

and in the brief *amici curiae* filed in this case,[2] the 1996 Act actually increases the importance of this case because it shifts responsibility from the federal government to the States for providing welfare benefits and ensures that the issue in this case will arise again and again. As stated in the petition, there is already considerable conflict among the lower courts on the issue in this case. Pet. 15-24; *infra* 7-10. The 1996 Act makes that issue even more important because it requires all States accepting federal block grants to submit a plan indicating how they will implement the right to a hearing under their benefits programs. Pet. 25 n.12. Thus, resolution of the important question presented in this case will help States comply with one of the mandates of the 1996 Act.

5. Finally, respondents state that there is no conflict between the decision below and the numerous decisions cited in the petition. Yet their basis for so stating depends upon acceptance of their contested view of the very issue that is in dispute in this case. Citing only two of the many cases on which petitioners rely (*Youakim* v. *McDonald*, 71 F.3d 1274 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 2571 (1996), and *Greene* v. *Babbitt*, 64 F.3d 1266 (9th Cir. 1995)), respondents assert that those cases are "distinguishable" from the case at hand because "the programs involved in those cases had open-ended entitlements, as opposed to programs where legislatures have placed durational limits on entitlements." Br. in Opp. 17. This simply repeats respondents' misunderstanding of the issue in this case. As discussed above, petitioners' argument is that it is irrelevant that the District used certification periods; petitioners had a right to due process because D.C. law permitted them to continue to receive benefits so long as

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[2] Brief *Amici Curiae* for Child Welfare League of America, Disability Rights Education and Defense Fund, Inc., National Law Center on Homelessness & Poverty, and National Senior Citizens Law Center in Support of Petitioners 6.

they remained eligible for them. Thus, respondents' attempt to deny the existence of a conflict in the lower courts assumes the correctness of their legal position. *Greene* and *Youakim* do, in fact, conflict with the decision below because in each, as here, there was a change in benefits eligibility criteria, and because in each, unlike here, the court rejected the argument that the benefits recipients lacked a property interest on account of the change. *See* Pet. 16-18 (discussing these cases).

Furthermore, respondents do not make any attempt to address the many other conflicting cases petitioners cited in the petition for certiorari, some of which plainly conflict with the decision below and clearly did not involve "open-ended entitlements." Br. in Opp. 17. As noted in the petition, four circuit courts have held that when in the early 1970's various federally-funded state disability programs were replaced with the federal SSI program, those who had been receiving benefits under the state programs had a property interest in the continued receipt of benefits under the federal program, and so were entitled to a hearing before they could be denied SSI benefits. *See* Pet. 19-20 (discussing *Tatum* v. *Mathews*, 541 F.2d 161 (6th Cir. 1976); *Johnson* v. *Mathews*, 539 F.2d 1111 (8th Cir. 1976); *Brown* v. *Weinberger*, 529 F.2d 514 (4th Cir. 1975); and *Ryan* v. *Shea*, 525 F.2d 268 (10th Cir. 1975)). In other words, these courts held that when one benefits program ended and another began, the recipients of benefits under the old program had a property interest in receiving benefits under the new one. That is also this case. Hence, there is simply no merit to respondents' claim that none of the cases petitioners cite is like this one.

Respondents, like the Court of Appeals, argue that when petitioners' certification periods expired following the enactment of D.C. Law 9-27, they stood "under the statute in virtually the same posture as a first-time applicant." Br. in Opp. 17. *Accord* Pet. App. 15a.

Even if that were true (which it is not), there would still be a serious conflict on the question whether petitioners had a property interest. As explained in the petition, all of the federal courts of appeals to have considered the question are in agreement that an applicant for welfare benefits, no less than a current recipient, has a property interest protected by the Due Process Clause. *See* Pet. 21-22 (discussing *Mallette* v. *Arlington County Employees' Supp. Ret. Sys. II*, 91 F.3d 630 (4th Cir. 1996)).[3]

All told, the court below offered three reasons for its conclusion that petitioners had no property interest in receiving benefits. The court said petitioners lacked such an interest because (1) they did not meet the new eligibility standards (Pet. App. 10a); (2) their certification periods ended (*id.* at 4a); and (3) they were like first-time applicants for benefits (*id.* at 15a). Each of these propositions conflicts with several federal circuit court cases, as the petition explained (*see* Pet. 16-22) and as the following chart reflects:

proposition	*conflicts with*
(1) not meet new standards	*Greene, Youakim* & *Mallette*
(2) certification periods ended	*Tatum, Johnson, Brown* & *Ryan*
(3) like first-time applicants	*Mallette* & cases cited therein

[3] The Fourth Circuit said in *Mallette*:

> As explained in *Roth*, the Supreme Court's due process jurisprudence focuses on whether statutory provisions create a right, not whether benefits have been received in the past. 408 U.S. at 577. The Arlington Retirement System creates in its members a legitimate expectation of receiving benefits and a consequent right to be heard. Eligible applicants are no less entitled to that expectation than are eligible recipients, and the potential consequences of denying disability benefits are no less potentially dire than those of revoking them. [91 F.3d at 640.]

Because the issue in this case was decided below in a way that squarely conflicts with this Court's due process precedents and the decisions of many other federal appellate and state supreme courts; is extremely important to the millions of Americans who receive public assistance; and is sure to bedevil the lower courts for years to come as the welfare reform movement takes hold, the exercise of this Court's certiorari power is appropriate.

* * *

For the foregoing reasons, as well as those set forth in the petition for certiorari, the petition should be granted.

Respectfully submitted,

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